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No. 89-275

IN THE
Supreme Court of the United States
October Term, 1989

COOTER & GELL,
Petitioner,

v.

HARTMARX CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amicus will address the following issues:

1. Whether authority exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed.R.Civ.P. 41(a)(1)(i).

2. Whether a court of appeals can automatically impose Rule 11 sanctions on appeal upon affirmance of a Rule 11 award.

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the interests of the free enterprise system. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business. *See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois* (Docket # 88-1755; *cert. granted*, 57 U.S.L.W. 3859 (1989)); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); *Tull v. United States*, 107 S.Ct. 1831 (1987);

and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as a result of the litigation explosion that has clogged both State and federal courts. WLF believes that amended Rule 11, Fed.R.Civ.P., can be an effective tool in combatting the ill effects of the litigation explosion; accordingly, WLF has consistently advocated for an expansive reading of Rule 11. Since WLF's approach to this case is focused less on the facts of the case and more on the policy considerations underlying Rule 11, WLF believes that it can assist the Court by providing the Court with a perspective that is distinct from that of either party.

WLF submits this brief on behalf of Respondents with the written consent of both parties.

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* adopts by reference the statement of the case set forth by Respondents. Nonetheless, WLF wishes to clarify what is *not* at issue in this case. Whether the district court abused its discretion in imposing Rule 11 sanctions on Petitioner under the facts of this case is not before the Court. The court of appeals held that the district court did not abuse its discretion when it imposed Rule 11 sanctions (*Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 896 (D.C. Cir. 1989)), and this Court declined to review the court of appeals' determination. Accordingly, the lengthy recitation of the facts of this case contained in Petitioner's brief is essentially irrelevant to the outcome of the case. That lengthy recitation -- which relates primarily to Petitioner's conduct before filing suit -- appears to be an attempt to cast Petitioner in a more

sympathetic light but has little bearing on the outcome of the issues that the Court has agreed to review.

Similarly, whether the amount of sanctions awarded against Petitioner was "so excessive as to constitute an abuse of discretion" also is not before the Court. The court of appeals held that the amount of Rule 11 sanctions imposed by the district court did not constitute abuse of discretion (*id.* at 897), and this Court declined to review the court of appeals' determination. Petitioner argues at length in its brief that Respondents failed to mitigate their damages and thus that the Rule 11 sanctions awarded to Respondents should have been reduced accordingly. Petitioner's Brief at 7-8, 14, 17-18, 36, and 38-39. Regardless of the merits of Petitioner's arguments, the arguments are irrelevant since the issue of whether Respondents improperly failed to mitigate their damages is not before the court.

This brief addresses the first and third questions presented for review in this case: whether authority exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed.R.Civ.P. 41(a)(1)(i), and whether a court of appeals may impose Rule 11 sanctions on appeal upon affirmance of a Rule 11 award. The brief does not address the second question presented for review: whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate.

SUMMARY OF ARGUMENT

Rule 41. Voluntary dismissal of a case under Rule 41(a)(1)(i), Federal Rules of Civil Procedure, does not deprive a district court of power to impose Rule 11 sanctions against a plaintiff. Nothing in the language of Rule 41(a)(1)(i) requires such a result. Moreover,

prohibiting an award of Rule 11 sanctions under those circumstances would run counter to the policy considerations underlying Rule 11. In any event, Petitioner was not entitled to invoke Rule 41(a)(1)(i), because Respondents filed the equivalent of a summary judgment motion prior to Petitioner's attempted voluntary dismissal.

Appellate Attorney Fees. The court of appeals did not impose any appellate attorney fees on Petitioner in this case. Rather, the court of appeals remanded the case to the district court in order to permit the district court to determine what additional sanctions against Petitioner were warranted under Rule 11. Since no fees were imposed, there is no occasion for this Court to consider whether the court of appeals exceeded its powers. The court of appeals acted properly in determining that the change in circumstances since the district court's initial Rule 11 determination -- *i.e.*, the incurring by Respondents of additional attorney fees on appeal -- warranted a remand to the district court for a redetermination of the appropriate Rule 11 sanction.

Rule 11 Generally. Petitioner's brief is a thinly disguised attack on the entire framework of Rule 11; the brief suggests that Rule 11 is being widely abused and that use of the rule needs to be curbed. While Petitioner's attack on Rule 11 has no bearing on determination of the issues which the Court has agreed to review, WLF believes that it is important that the attack not go unanswered. Far from being the untamed monster described by Petitioner, Rule 11 is an important and effective tool in the effort to rid the federal courts of abusive litigation tactics.

ARGUMENT

I. RULE 11 IS A VALUABLE TOOL IN THE EFFORT TO CURB ABUSIVE LITIGATION TACTICS AND SHOULD NOT ITSELF BE CURBED IN THE FACE OF UNFOUNDED ALLEGATIONS THAT IT IS CHILLING ADVOCACY.

Underlying most of the arguments raised by Petitioner in this case is a thinly disguised hostility to Rule 11. As Petitioner would have it, Rule 11 is a monster in need of taming. Petitioner contends that Rule 11 has "become part of every defendant's litigation bag" (Petitioner's Brief at 34 n.31) and "chills creative litigation" (*id.* at 34) and that application of Rule 11 is "confused" and "unpredictable" (*id.* at 33). An unstated premise of Petitioner's argument is that this Court could help to tame Rule 11 by ruling for Petitioner on the issues raised in this case.

As set forth in Parts II and III of this brief, *infra*, the Washington Legal Foundation (WLF) opposes the position taken by Petitioner on the issues raised in this case. More fundamentally, however, WLF disagrees with Petitioner's assessment that the application of Rule 11 needs to be curbed. To the contrary, WLF believes that Rule 11, as amended in 1983, is a valuable tool in the effort to curb abusive litigation; its use ought to be encouraged to the maximum extent possible, consistent with its language and intent.

Lest Petitioner's overall assessment of the impact of Rule 11 might influence the Court's disposition of the issues raised in this case, WLF believes it important to set forth the circumstances that led to the strengthening of Rule 11 in 1983 and to challenge Petitioner's assessment that Rule 11 needs to be curbed.

A. Rule 11 Was Amended in the Face of a Litigation Explosion That Threatens to Engulf Our Court Systems.

The circumstances that led to the strengthening of Rule 11 in 1983 should be borne in mind.[1] The decade that preceded the amendment of Rule 11 witnessed a litigation explosion, both in terms of the number of lawsuits being filed and in terms of the extent to which particular lawsuits were being drawn out by abusive litigation tactics. During the 1970's, federal district court filings doubled and trials lasting over 30 days tripled. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif. L. Rev. 770, 771 (1981). In filing a dissenting statement from the Supreme Court's adoption of the 1980 amendments to Rules 26, 33, 34, and 37, Justice Powell argued that the amendments fell far short of reforms necessary to curb what he viewed as abusive discovery tactics all too prevalent in federal litigation. *Order Adopting Rules Amendments*, 446 U.S. 997, 998 (1980) (Powell, J., dissenting). Justice Powell, joined in his dissent by Justices Stewart and Rehnquist, argued that as a result of inadequate controls on federal litigation discovery practices, "Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system." *Id.* at 1000. The federal courts became "increasingly mired in congestion, delay, and high litigation costs," at least in part due to the liberal pleading rules of the Federal Rules of Civil Procedure, which made it virtually im-

[1] The 1983 amendments to the Federal Rules of Civil Procedure also included related amendments to Rule 7, Rule 16 (which, among other things, provided federal district courts with explicit authority to impose sanctions upon a party or attorney that fails to obey a scheduling or pretrial order) and Rule 26(g) (which imposes requirements on those filing discovery requests that parallel the requirements of Rule 11).

possible for courts to weed out unmeritorious claims and defenses prior to trial. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N. C. L. Rev. 1023, 1024-1033 (1989).

The 1983 amendments to the Federal Rules of Civil Procedure were an attempt to curb the abuses that had contributed to the litigation explosion of the 1970's. Rule 11 was amended to provide for more frequent imposition of sanctions against parties who abuse the litigation process by filing pleadings or motions not well founded in fact or law. *See* Notes of Advisory Committee on Rules regarding 1983 amendment to Rule 11 ("Advisory Committee Notes") ("Experience shows that in practice [former] Rule 11 has not been effective in deterring abuses... The new language is intended to reduce the reluctance to impose sanctions"). At the same time, Rule 26(g) was added "to curb discovery abuses by explicitly encouraging the imposition of sanctions." Advisory Committee Notes regarding 1983 amendment to Rule 26.

It remains to be seen whether the 1983 amendments will provide an effective check against abusive litigation tactics. Nonetheless, in evaluating the merits of amended Rule 11, one must bear in mind the extreme problems in our court systems that gave rise to the amendment.

B. Amended Rule 11 Has Not Had the Chilling Effect on Creative Advocacy Asserted by Petitioner and Does Not Need To Be Curbed.

Despite Petitioner's assertion to the contrary, there is no evidence that amended Rule 11 is chilling "crea-

tive advocacy" or is otherwise in need of being curbed. Commentators who have studied the effects of Rule 11 have been unable to detect any appreciable chilling effect on non-abusive litigation tactics. For example, Judge Schwarzer of the U.S. District Court for the Northern District of California (whose views on Rule 11 are cited in Petitioner's brief) writes, "My own experience has disclosed no anecdotal evidence of chilling [of advocacy]." Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1017 (1988). *See also* Louis, *supra*, 67 N. C. L. Rev. at 1055; Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 Cath. L. Rev. 587, 590-91 (1987).

Petitioner cites studies showing that plaintiffs and their counsel are sanctioned more frequently than defendants; Petitioner asserts that those studies demonstrate that certain trial judges are imposing Rule 11 sanctions based on their "personal views," thereby chilling "creative litigation." Petitioner's Brief at 34.

The studies cited by Petitioner do not support that assertion. Perhaps the most comprehensive study to date on imposition of sanctions under Rule 11 -- and one cited by Petitioner -- was performed by Prof. Georgene Vairo. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988). That study indicated that between August 1, 1983 and December 15, 1987, Rule 11 sanctions were sought in 680 reported federal cases, and sanctions were imposed in 57.8% of those cases. Sanctions were imposed at an only slightly higher rate in cases in which the target was a plaintiff (59.6%) than in cases in which the target was a defendant (51.4%). *Id.* at 200.[2] Accordingly, the study offers no support

[2] The study found that since defendants were far more likely to bring Rule 11 motions than were plaintiffs, the total number of occasions on which plaintiffs were sanctioned far exceeded the number of occasions on which defendants were sanctioned. *Id.* at 200. The study drew no conclusions from the disparity in Rule 11 filings by defendants versus filings by plaintiffs; in particular, the study did not conclude that Rule 11 was in any way biased against plaintiffs. The study opined that the disparity might mean that plaintiffs as a group are more likely to file frivolous pleadings and motions than are defendants. *Id.* at 201.

(continued...)

for Petitioner's assertion that discriminatory imposition of Rule 11 sanctions by federal judges is chilling creative advocacy.[3]

(...continued)

The study did not examine reported cases in which sanctions were imposed under Rule 26(g) for discovery abuses. One can surmise that the principal abusive litigation tactic engaged in by plaintiffs as a group is the filing of frivolous complaints, while the principal abusive litigation tactic engaged in by defendants as a group is the filing of unwarranted discovery requests. If that is correct, one would expect that plaintiffs would be the targets in a majority of Rule 11 motions and that defendants would be the targets in a majority of Rule 26(g) motions. Neither the Vairo study nor the other studies cited by Petitioner attempt to measure the combined effect of all the 1983 rules amendments on plaintiffs versus their effect on defendants.

[3] Nor is Petitioner's assertion supported by the Vairo study's finding that plaintiffs in civil rights lawsuits are sanctioned under Rule 11 at a rate significantly higher than other litigants. The study drew no conclusions from that finding. *Id.* at 200. Other commentators have concluded that civil rights cases have long been "regarded as a major source of meritless litigation." Louis, *supra*, 67 N. C. L. Rev. at 1055. That conclusion -- which would explain any disparity in sanctioning rates -- is hardly surprising when one considers that a majority of "civil rights" cases in federal court are suits filed by state prisoners complaining about the conditions of their confinement, often filed without the assistance of counsel. *See Patsy v. Board of Regents*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting). Moreover, increased imposition of Rule 11 sanctions in civil rights lawsuits is particularly unlikely to deter the assertion of non-frivolous civil rights claims in light of the availability of attorney fees to prevailing plaintiffs in such suits, under 42 U.S.C. § 1988.

Petitioner's assertion that Rule 11 sanctions are being imposed disproportionately on plaintiffs is particularly ironic when one considers that Danik, Inc. (Petitioner's client), while nominally a plaintiff in this case, could more accurately be described as a defendant in its overall posture *vis-a-vis* Respondents. One of the Respondents initially filed suit against Danik for nonpayment of certain invoices, and Danik responded by filing a counterclaim alleging Robinson-Patman Act violations. While Danik could have chosen to file its antitrust claims against Respondents as an additional counterclaim, it instead chose to file those claims (claims later found to have been filed in violation of Rule 11) in a separate lawsuit. Petitioner's Brief at 3. Petitioner made clear in subsequent settlement discussions that settlement of the unpaid invoice claims was tied to settlement of the antitrust claims; accordingly, Danik's antitrust claims can be said to have been part of its defense to the unpaid invoice claims. Petitioner's filing of Danik's antitrust claims in violation of Rule 11 is hardly unprecedented: one commentator has found that "[f]or many years ... answers to complaints filed by large businesses routinely would include an antitrust counterclaim." Louis, *supra*, 67 N. C. L. Rev. at 1031 n.62. Indeed, the facts of this case undermine any assertion that Rule 11 is designed to benefit defendants at the expense of plaintiffs; defendants filing frivolous antitrust counterclaims in order to avoid payment of valid contractual claims are just as liable for sanction under Rule 11 as any plaintiff filing a frivilous claim.

Perhaps the best evidence that imposition of Rule 11 sanctions is not chilling non-frivolous litigation is the small number of occasions on which such sanctions have been imposed. The Vairo study uncovered 380 reported instances in which Rule 11 sanctions had been imposed in the first four and one-half years following

adoption of amended Rule 11. Even assuming that there were at least as many unreported instances of imposition of Rule 11 sanctions during the same period, the total number of instances in which Rule 11 sanctions have been imposed is miniscule in comparison to the total number of pleadings, motions, and other papers filed in federal court each year.[4]

WLF submits that there is no basis for the premise underlying Petitioner's brief that Rule 11 sanctions have been unfairly applied in practice and therefore ought to be curbed. The Court ought to decide this case based solely on the language and intent of Rule 11 and not on a generalized belief that the reach of Rule 11 ought to be restricted.

II. VOLUNTARY DISMISSAL UNDER RULE 41 (a)(1)(i) DOES NOT PRECLUDE SUBSEQUENT IMPOSITION OF RULE 11 SANCTIONS.

Petitioner filed this lawsuit on behalf of Danik in November 1983. Respondents subsequently filed a motion to dismiss under Rule 12(b)(6) for failure to state a cause of action; the motion was accompanied by affidavits denying the factual underpinnings of Danik's claims. Five days later, Respondents filed a motion seeking imposition of Rule 11 sanctions against both Danik and Petitioner, alleging that the complaint was not well founded in fact or law. The district court heard oral arguments on both motions, but before the court could issue a ruling, Petitioner filed a notice of voluntary dismissal of the lawsuit under Rule 41(a)(1)(i) in April 1984. Almost four years later, in February

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[4] In excess of 250,000 new civil cases are filed in the federal courts in a typical year. *See* Levin and Sobel, *supra*, 36 Cath. L. Rev. at 592 n.19.

1988, the district court granted Respondents' Rule 11 motion.

Petitioner contends that, due to its voluntary dismissal pursuant to Rule 41(a)(1)(i), the district court was precluded from taking any further action in the case -- including ruling on the pending Rule 11 motion. The relationship between Rule 41(a)(1)(i) and Rule 11 has been the subject of numerous appellate court decisions, including the decision of the court below that Rule 41(a)(1)(i) dismissal does not bar a district court from ruling on a Rule 11 motion. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 895 (D.C. Cir. 1989). Five other courts of appeals have agreed with the D.C. Circuit (the First, Third, Seventh, Eighth, and Ninth Circuits),[5] while one court of appeals (the Second Circuit) has taken the contrary view.[6]

WLF supports the majority position. WLF will not repeat the numerous arguments raised by the written decisions issued by the six courts of appeals that held that Rule 41(a)(1)(i) does not bar a district court from ruling on a Rule 11 motion. Nonetheless, WLF wishes to stress several points that may not previously have been fully explicated.

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[5] *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*, ___ F.2d ___, No. 89-5309 (3d Cir. 1989); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603-04 (1st Cir. 1989); *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-79 (7th Cir. 1987), *cert. dismissed*, 108 S.Ct. 1101 (1988); and *Kurkowski v. Volcker*, 819 F.2d 201, 203 (8th Cir. 1987).

[6] *Johnson Chemical Co. v. Home Care Products, Inc.*, 823 F.2d 28, 30-31 (2d Cir. 1987).

A. Rule 41(a)(1)(i) Is Inapplicable to This Case Because Respondents Filed the Equivalent of a Summary Judgment Motion Prior to the Filing of the Dismissal Notice by Plaintiff.

Rule 41(a)(1)(i) permits a plaintiff to file a notice of dismissal without prejudice "at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first." Prior to Petitioner's filing of a dismissal notice in this case, Respondents filed a motion designated as a motion to dismiss under Rule 12(b)(6) for failure to state a cause of action. However, the motion was accompanied by affidavits which introduced evidence outside the pleadings, and those affidavits were not excluded by the district court. Accordingly, pursuant to Rule 12(b), Respondent's motion should be treated as one for summary judgment.

Since Respondents should be deemed to have filed a summary judgment motion and since that motion was filed before Petitioner attempted a voluntary dismissal, Rule 41(a) precluded Petitioner from obtaining a voluntary dismissal in the absence of permission either from the court or from Respondents -- neither of whom gave their consent in this case. Case law is clear that the filing of a motion which is designated a motion to dismiss, but which should, in fact, be classified as a motion for summary judgment within the meaning of Rule 12(b), operates to prevent a voluntary dismissal under Rule 41(a)(1)(i). *See* 5 *Moore's Federal Practice* ¶ 41.02[3] at 41-26 (2d ed. 1985). Accordingly, regardless of how the Court comes out on the legal issue that resulted in a 6-1 split of the courts of appeals, Petitioner should not be permitted to invoke Rule 41(a)(1)(i) under the facts of this case.

B. The Plain Language of Rule 41(a)(1)(i) Supports a Finding That the District Court Was Entitled to Rule Upon the Rule 11 Motion.

WLF cannot agree with Petitioner's contention that the plain language of Rule 41(a)(1)(i) supports Petitioner's position in this case. Indeed, a straightforward reading of Rule 41(a)(1)(i) leads one to the opposite conclusion. Rule 41(a)(1)(i) states merely that a voluntary dismissal under that Rule is "without prejudice." In other words, Rule 41(a)(1)(i) provides that a plaintiff meeting the prerequisites of that rule is not to be placed in a worse position as a result of filing a voluntary dismissal. But subjecting such a plaintiff to a Rule 11 motion for sanctions does not place the plaintiff in a position any worse than the position that he would have been in but for the voluntary dismissal, because he still would have been subject to a motion for sanctions even had he not moved for voluntary dismissal. Consequently, nothing in the language of Rule 41(a)(1)(i) precludes application of Rule 11 to a plaintiff who has obtained a voluntary dismissal.

Petitioner cites to case authority holding that once a plaintiff has obtained a voluntary dismissal in compliance with Rule 41(a)(1)(i), the district court is without power to enter any order that would prejudice the plaintiff's right to reassert the same claim in that court or another court. None of those cases has any bearing on this case. Leaving aside statute of limitation questions, Respondents do not contend that Danik's right to reassert its antitrust claims now or in the future was in any way prejudiced by Danik's assertion and subsequent voluntary dismissal of those claims. Rather, the issue is whether Petitioner may be sanctioned under Rule 11 for conduct found both by the district court and by the court of appeals to be in violation of Rule 11. WLF

submits that nothing in the language of Rule 41(a)(1)(i) prevents imposition of such a sanction.

C. Policy Considerations Underlying Rule 11 Support an Award of Sanctions.

The briefs of Petitioner and its supporting *amici* suggest that allowing federal court plaintiffs a Rule 41(a)(1)(i) "safe harbor," free from fear of Rule 11 sanctions, would promote efficient operation of the federal judicial system. WLF finds unpersuasive each of the policy arguments raised in those briefs.

First, there is no reason to believe, as asserted by Petitioner and the Association of Trial Lawyers of America, that permitting imposition of Rule 11 sanctions following a Rule 41(a)(1)(i) dismissal would discourage voluntary dismissal of cases. The fact that a voluntary dismissal has been filed could not be used as evidence that a lawsuit was filed in violation of Rule 11, since the violation -- if one occurs -- is complete upon the filing of the pleading in question; thus, the state of mind or conduct of a plaintiff or his counsel at a point in time after the initial filing has no bearing on whether the filing was made in violation of Rule 11. To the contrary, a plaintiff/counsel who fears that he may have committed a Rule 11 violation has every incentive to file a voluntary dismissal at the earliest possible moment, because such a filing would serve to minimize the attorney fees that he might later be ordered to reimburse as a Rule 11 sanction.

The Association of Trial Lawyers of America also suggests that little harm can come from giving plaintiffs one free bite (*i.e.*, a little breathing room between the time the complaint is filed and the time an answer is filed during which time no Rule 11 sanctions are awardable) because it is "a rare plaintiff" who starts a

lawsuit without any intent of pursuing it. ATLA Brief at 8. WLF disagrees with that assessment; indeed, the record facts in this case suggest that Petitioner filed its antitrust suit with little intention of pursuing it beyond the most preliminary stages. Rather, Petitioner appears to have filed suit as a way of obtaining leverage over Respondents in the collection action that Respondents had filed against Danik.[7] Providing plaintiffs with the

[7] The record suggests that Petitioner had such a motivation irrespective of the distict court's finding that Petitioner failed to make a reasonable inquiry, prior to filing the antitrust complaint, into the facts alleged therein. Even if one accepts that Petitioner's pre-filing inquiry was sufficient to give Petitioner a reasonable basis for believing that Respondents had established a distribution network involving an exclusive retail agent in each major metropolitan area, that factual predicate would have been insufficient as a matter of law to establish any causes of action. This Court has held that the "rule of reason" applies in determining whether a non-price vertical restraint of trade (such as the establishment of exclusive sales agents by a manufacturer of goods) violate the antitrust laws. *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977). In applying the rule of reason, "The reasonableness of a particular non-price vertical restraint is judged by whether it produces an anticompetitive effect in interbrand competition [*i.e.*, competition among various producers] in the relevant geographic and product markets and not merely by whether it reduces intrabrand competition [*i.e.*, competition among various retailers handling the product of the company imposing the vertical restraint]." *Carlson Machine Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1262 (5th Cir. 1982). Petitioner had absolutely no basis for believing that any exclusive sales agent network established by Respondents could have any effect on interbrand competition in the relevant market: men's clothing sold in the United States. Respondents controlled only a tiny percentage of that market; courts have held as a matter of law that such a small share of the relevant market is too small for any restraint on intrabrand competition (which Petitioner believed to consist of an exclusive sales agent network) to have a substantially adverse effect on interbrand competition. *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir. 1983). Thus, assuming the facts to be as Petitioner believed them to be, Petitioner allegation that Respondents had violated the antitrust laws was unwarranted, both on the basis of existing law and on the

(continued...)

breathing space sought by ATLA would significantly diminish the risk of sanctions to plaintiffs/counsel who file lawsuits in violation of Rule 11 solely for the purpose of obtaining settlement leverage.

WLF does support one of the suggestions made by ATLA in its brief. Noting the long delay in this case between the filing of Respondent's Rule 11 motion and the district court's ruling, ATLA suggests that the Court establish guidelines regarding timeliness of Rule 11 motions and rulings. WLF concurs in that suggestion. A defendant should not be permitted to wait inordinately following a Rule 41(a)(1)(i) dismissal to file a Rule 11 motion, and justice is not served when a district court delays almost four years before ruling on a Rule 11 motion. Nonetheless, Respondents -- who filed their Rule 11 motion long before Petitioner filed its Rule 41(a)(1)(i) notice -- should not be penalized for the district court's delay, a delay that was beyond Respondents' control.

III. THE COURTS BELOW PROPERLY EXERCISED THEIR RULE 11 POWERS IN FORMULATING A SANCTION THAT INCLUDED APPELLATE COSTS.

After affirming the district court's imposition of Rule 11 sanctions, the court of appeals in this case directed the district court to enter an "appropriate" additional award taking into account attorney fees incurred by Respondents on appeal. Petitioner contends that the court of appeals had no power to shift the burden of appellate attorney fees from Respondents to Petitioner in the absence of a finding, pursuant to

[7] (...continued)
basis of an argument for the extension, modification, or reversal of existing law.

Federal Rule of Appellate Procedure 38, that the appeal was frivilous.[8] WLF disagrees with that contention.

There is a split of authority in the courts of appeals regarding whether appellate attorney fees are awardable as a Rule 11 sanction where the appeal is non-frivolous. Two courts of appeals (the First and Seventh Circuits) agree with the D.C. Circuit that such fees are awardable as a Rule 11 sanction,[9] while two courts of appeals (the Fourth and Ninth Circuits) hold that such fees are recoverable only if the appeal from Rule 11 sanctions is itself frivolous.[10] WLF will again refrain from repeating arguments contained in any of the court of appeals decisions but will confine its arguments to several other issues that may be of assistance to the Court.

A. Question of Whether Court of Appeals Has "Power" to Award Attorney Fees Is Not Relevant, Since Any Award in This Case Will Come from District Court.

Petitioner and its supporting *amici* phrase much of their discussion of the appellate attorney fees issue in terms of whether courts of appeals have "power" to

[8] WLF would concede that Petitioner's appeal to the court of appeals was not frivolous, at least to the extent that the appeal was based on Petitioner's Rule 41(a)(1)(i) claim. In light of the Second Circuit precedent supporting Petitioner's position on that issue, it would be impossible to characterize Petitioner's appeal as utterly frivolous.

[9] *Hays v. Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988); *Muthig, supra*, 838 F.2d at 607.

[10] *Orange Production Credit Association v. Frontline Ventures, Ltd.*, 801 F.2d 1581 (9th Cir. 1986); *Basch v. Westinghouse Electric Corp.*, 777 F.2d 165, 175 (4th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986).

impose such fees in non-frivolous appeals of Rule 11 sanctions. However, the question of the courts of appeals' "power" is largely irrelevant to the determination of this case, because any award of appellate attorney fees to Respondents will come from the district court, not the court of appeals.

The court of appeals stated explicitly that it was not awarding Rule 11 fees on its own authority: "Here, however, we do not 'award fees under Rule 11'; we merely reaffirm that the district court's award under Rule 11 of expenses 'incurred because of' the unfounded filing should include appellate expenses incurred in defense of that award... [W]e remand to the district court to determine such expenses and, ultimately, to enter an appropriate award." *Danik, Inc. v. Hartmarx Corp., supra*, 875 F.2d at 898. It will be up to the district court on remand to determine the appropriate amount of any additional Rule 11 sanction; that additional sanction may or may not be as large as appellate attorney fees incurred by Respondents. The district court may decide that some portion of Respondents' appellate attorney fees was unreasonable and it may further decide, based on all the facts of the case, that little or no additional sanction is warranted.[11]

[11] The appropriate amount of any additional Rule 11 sanction must, in the first instance, be left to the discretion of the district court. That is true in light of Rule 11's primary purpose as a deterrent against abusive litigation practices rather than as a method of compensating the victims of those abusive practices. *See Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 58 U.S.L.W. 4038, 4039 (1989). The plain language of Rule 11 makes clear that an award of compensation is at the discretion of the district judge; if the district judge on remand in this case believes that no deterrent effect would be achieved by an additional award to Respondents, then he would be acting in accordance with Rule 11 (and within his mandate from the court of appeals) in granting no further Rule 11 sanctions.

The court of appeals in this case did nothing more than facilitate a reappraisal of the case by the district court in light of changed circumstances. At the time it initially determined a proper Rule 11 sanction (a sanction, by the way, that was far less than the district court attorney fees actually incurred by Respondents), the district court could not take into account Respondents' appellate attorney fees because it had no way of knowing whether Petitioner and/or Danik would appeal. Thus, had the court of appeals declined to remand the case to the district court for reappraisal of Rule 11 sanctions in light of Respondents' newly incurred appellate attorney fees, Respondents would have lost all opportunity to seek compensation for a portion of the costs it incurred (in the words of Rule 11) "because of" a Rule 11 violation. Far from exceeding its "powers," the court of appeals acted in a manner most likely to effectuate the purposes of Rule 11.

B. Policy Considerations Underlying Rule 11 Dictate that Appellate Fees Be Recoverable.

Contrary to the contentions of Petitioner and supporting *amici*, permitting victims of Rule 11 violations to seek recovery of appellate attorney fees (when no such recovery is permitted to those accused of Rule 11 violations who prevail on appeal) does not unduly favor one party to an appeal over the other. It is inescapable, in the event of a Rule 11 appeal, that the party claiming to have been the victim of a Rule 11 violation will incur appellate attorney fees. Those fees will have to be borne by one of the two parties. It may well be that the Rule 11 violator raises non-frivolous issues on his appeal and to that extent his appeal can be said to be justified; nonetheless, both fairness and the purposes of Rule 11 dictate that if the Rule 11 violator loses on appeal, he rather than the victim of his violations ought

to bear the costs incurred as a result of that appeal, costs that would not have been incurred but for the initial Rule 11 violation.

Moreover, there is virtually no danger that a rule permitting award of appellate attorney fees in Rule 11 cases will unduly chill meritorious appeals from Rule 11 sanctions, particularly in cases in which the sanction is imposed against counsel. As both the Chicago Council of Lawyers and Petitioner recognized in their briefs, the collateral consequences to a lawyer of a Rule 11 sanction are sufficiently great that he will virtually always appeal from such an award, regardless of its size. The real danger is that victims of Rule 11 violations would be discouraged from seeking Rule 11 sanctions against the offending attorney in the absence of a rule permitting the award of appellate attorney fees, because such victims would quickly recognize that any award could easily be dwarfed by the nonreimbursable costs of defending that award.

As the brief of Public Citizen recognized, where prevailing parties to a lawsuit are permitted by statute to recover attorney fees, courts have held that they are also entitled to recover attorney fees expended in defending their fee awards on appeal. Brief of Public Citizen at 17. In the absence of such a rule, any recovery at the trial court level could easily be devoured by appellate costs. WLF submits that the same considerations that dictate recovery of appellate fees in cases involving fee-shifting statutes dictate that Respondents should have an opportunity to recover their appellate costs in this case.

CONCLUSION

For the foregoing reasons, *amicus* Washington Legal Foundation respectfully requests that the Court

affirm the decision of the court of appeals and remand the case to the district court for a determination regarding an appropriate award of appellate attorney fees as an additional Rule 11 sanction.

Respectfully submitted,

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